

NDIS Appeals

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Queensland
Advocacy
Incorporated

Acknowledgement of Country

I begin today by acknowledging the Jagera and Turrbul people, Traditional Custodians of the land on which I come to you from today, and pay my respects to their Elders past and present. I extend that respect to all Traditional Custodians of the lands which our attendees are on, and any Aboriginal and Torres Strait Islander peoples here today.

We acknowledge the stories, traditions and living cultures of Aboriginal and Torres Strait Islander peoples on this land and commit to building a brighter future together.





About QAI

Queensland Advocacy Incorporated (QAI) is an independent not-for-profit advocacy organisation and specialist community legal centre for people with disability.

Our Mission

Our mission is to advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland.

What we do

Systems advocacy directed to attitudinal, law and policy change.

Individual advocacy providing specialist legal and non-legal advocacy service to people with disability in Queensland.

Our Services

- Mental Health Law
- Human Rights Law
- Justice Support Advocacy
- DRC Advocacy
- Indigenous Advocate
- NDIS Appeals Advocacy
- NDIS Decision Support Advocacy
- Young Peoples Advocacy
- Education Advocacy
- Pathways Helpline

Overview for today

- Some context: The NDIS and Plans
- Review the criteria in the NDIS Act for the two most common decisions made by the NDIA which are reviewed and appealed:
 - Access
 - Supports
- Cover the process to ask for review of a decision
- Our tips for applying for an internal decision
- Our tips for applying for an external decision and what happens in the Tribunal

National Disability Insurance Scheme

Overview

- The Scheme and the Agency (NDIA) responsible for administering the Scheme was established under the National Disability Insurance Scheme Act 2013 (NDIS Act)
- The NDIS Act sets out the requirements for:
 - Access to the Scheme (Chapter 3, Part 1), and
 - Once a person has access the criteria for the supports that will be funded in a plan for a participant (Chapter 3, Part 2)
- By December 2021, there were just over 500,000 participants in the Scheme.
- Estimated cost for 21/22 year is \$29.2 billion and with projections that will increase to \$41.1 billion by 2025
- In December 2021 there were 1910 active cases in the AAT up from 405 in December 2020

<https://www.ndis.gov.au/about-us/publications/quarterly-reports>



NDIS plans

What is in a Plan

- Goals: A participant's goals and how they will be achieved
- Time period: e.g. 1 year, 2 years or 3 years
- Supports: A 'statement of supports' which is the supports and the funding for the supports in a plan

What is funded

- Supports are divided into:
 - Core supports (which includes daily support for example a support worker)
 - Capacity building (therapy supports)
- Plans may include funding for a support coordinator and / or a plan management
- They can also cover home modifications and / or assistive technology (eg the purchase of a wheelchair)
- Specialised Disability Accommodation (SDA)
- It can be difficult on the face of a plan to understand exactly what is funded
- The [NDIS Price Guide](#) can help
- Support coordinators or local area managers should also be able to help a participant understand what has been funded

Common reviewable decisions

The most common reviewable decisions are:

- **Access Decision:** A decision to refuse access to the Scheme by a person
- **Supports Decision:** A decision about the supports that are funded in a plan.

Access Requirements

- The access requirements are set out in **Chapter 3, Part 1**.
- To become a participant in the Scheme a person must meet the access criteria.

Access Criteria

- The age requirement (aged under 65 at the time the access request is made) (**s22**)
- The residence requirement (resides in Australia and is either an Australian citizen or holder of a permanent visa cf: New Zealand residents living in Australia) (**s23**)
- The disability requirements (**s24**) or the early intervention requirements (**s25**)

Disability Requirements

- The requirements are set out in:
 - **Section 24** of the NDIS Act
 - [NDIS \(Becoming a Participant\) Rules 2016](#)
 - The [Access NDIS Operational Guideline](#)
- A person meets the requirements if:
 - The person has a disability that is attributable to one or more impairments, and
 - The impairment is likely to be permanent, and
 - The impairment results in substantially reduced functional capacity to undertake activities of 'daily life', and
 - The impairment affects the persons capacity for social or economic participation, and
 - The person is likely to require support under the Scheme for the person's lifetime.

Disability Requirements - Permanence

- Meeting the permanence requirement can be challenging for applicants
- **Rule 5.4** of the Becoming a Participant Rules provides that an impairment is or is likely to be permanent only if there are no:
 - Known,
 - Available, and
 - Appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment.
- Reports from treating doctors need to set out a person's treatment history and address whether there are or are not any treatments which would be likely to remedy the impairment.
- Cases: [McFarlane and National Disability Insurance Agency \[2018\] AATA 4727 – 17 December 2018](#)

Disability Requirements – Functional capacity

- This evidence is best obtained from an occupational therapist,
- If an occupational therapist report is not available:
 - A GP, and
 - A good statement from the person (or carer) addressing the activities of daily life being:
 - Communication
 - Social interaction
 - Learning
 - Mobility
 - Self-care,
 - Self-management.
- No detail is too small. Be specific. Eg I cannot open the fridge door. If I need something from the fridge, I must ask my mum. Or I cannot lift my arm above my shoulder to brush my hair.
- Cases: Federal Court Decision of [Mulligan and the National Insurance Agency](#), 13 March 2015

Supports

Making a plan

- The making of a plan for a participant happens on:
 - Gaining access
 - At the end of a plan period
 - Following a change of circumstances request (section 48 of the NDIS Act)
- The process for making a plan usually allows for medical or allied health reports to be submitted and a plan review meeting to occur between the participant and a NDIA planner

Requirements for funding supports

- **Section 34** of the NDIS Act (reasonable and necessary criteria)
- [National Disability Insurance Scheme \(Supports for Participants\) Rules 2013](#)
- [Operational Guidelines](#)

Reasonable and Necessary Criteria

Reasonable and necessary criteria

- To fund a support the NDIA must be satisfied the support meets all the criteria set out in **section 34** of the NDIS Act.
- The criteria is commonly referred to as the ‘reasonable and necessary criteria’.
- The criteria are:
 - Will assist to pursue goals, objectives and aspirations
 - Will assist social and economic participation
 - Represent value for money
 - Effective and beneficial (regarding current good practice)
 - Considers informal supports
 - Most appropriately funded by the NDIS

Legislative framework for review of a NDIA decision

- The NDIS Act lists the decisions of the Agency that can be reviewed (**section 99**)
- The decisions listed in section 99 are subject to merits review which means the reviewer can take a fresh look at the facts / evidence (including new evidence) and make what it determines is the correct and preferable decision
- There are 33 decisions listed in section 99 which can be reviewed
- The most common decisions we see being reviewed are:
 - No. 1 a decision that a person does not meet the access criteria
 - No. 4 a decision to approve the statement of a participants supports in a participant's plan (support decision)

Internal Review / Section 100

- A reviewable decision listed in section 99 must first be reviewed internally via a **section 100** review. These are commonly referred to as:
 - Section 100 review, or
 - Internal review.
- An internal review application must be made to the Agency within 3 months after receiving the notice of the decision.
- For an access decision, the decision being reviewed is documented in a letter from the Agency to the person advising that they have not met the access criteria. These letters are referred to as a “Access Not Met” letter.
- For a support’s decision, each time a new plan is issued which includes a statement of supports, that can be reviewed (even if the plan is, apart from its dates identical to the previous plan).

Internal Review / Section 100

Our tips:

- An internal review can be commenced by phone or email. We recommend:
 - Apply in writing using the approved form
 - in the cover email or online form clearly list the Participants Number and that it is internal review
 - The date of the decision will be the date of the plan / date of the access not met letter
 - Clearly state the outcome being sought (this is particularly important for supports reviews)
 - Includes all reports previously given to the agency and any other additional reports obtained since the original decision
 - Point to specific paragraphs / statements / recommendations in the medical or allied health professional reports which support the decision the person is seeking

External Review – Administrative Appeals Tribunal

Internal review decision

Once an internal review decision is made, the internal review decision can be reviewed by the Administrative Appeals Tribunal (**s103**, NDIS Act)

The internal review decision should set out the reasons for the decision made at the internal review stage

Application to the AAT

- You have 28 days to appeal that decision to the AAT from the date the internal review decision is given to the applicant (**s29(2)** of the AAT Act)
- The application is straight forward and should be filed with a copy of the internal review decision
- If there is particular urgency due to risk to the person applying, a letter/ statement should be filed with the application setting out the reasons for that urgency (this will alert the Tribunal and assist when they triage the matter and bring forward the first case conference).
- The form can be found [here](#)

Administrative Appeals Tribunal

- The objects of the AAT are set out in **s2A** of the [Administrative Appeals Tribunal Act 1975](#)

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

- (a) is accessible; and
- (b) is fair, just, economical, informal and quick; and
- (c) is proportionate to the importance and complexity of the matter; and
- (d) promotes public trust and confidence in the decision-making of the Tribunal.

- The [General Practice Direction](#) and **section 33** of the AAT Act require that both parties to the dispute must use their best endeavours to assist the Tribunal to fulfil its objective.
- Section 33 of AAT Act sets out the procedure of the Tribunal. In particular the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

Administrative Appeals Tribunal

What happens after an application to the AAT is lodged?

- Case number is assigned
- A bundle of documents called “T Documents” are sent by the NDIA to the applicant
- A date for a case conference is set down
- The NDIA contacts the applicant and tells them a lawyer has been assigned to their case

Keep in mind

- Matters in the Tribunal commonly last between 6 to 12 months. Access matters often take longer.
- A person can withdraw at anytime.
- The process usually involves a series of case conferences where the issues are narrowed down to a point where:
 - an agreement is made as to the preferred decision,
 - a conciliation is held to try and resolve any final issues, or
 - a hearing is conducted by the Tribunal.
- Our experience is that most matters are resolved before going to hearing.
- The 31 December 2021 Quarterly Report from the NDIA provided that of the 5,679 AAT cases closed since the commencement of the Scheme only 145 of those went to a hearing.

Administrative Appeals Tribunal

T Documents

These should be all the documents previously given to the NDIA which are relevant to the decision being reviewed at the AAT.

Tip: Check these documents and if any are missing any, email the Tribunal and the NDIA lawyer asking for the document to be included in the T Documents.

First case conference and Statement of Issues

- A case conference is usually held by phone, runs for about an hour and is facilitated by a Registrar from the AAT.
- The NDIA is always represented by a lawyer. A person from the NDIA should also attend the case conference.
- Before the case conference the NDIA Lawyer sends a Statement of Issues which sets out what they understand to be the issues and if they require further reports or evidence to address the issues.

Case Conference and Supporting documents

- **Prepare:** Have the T Documents and the Statement of Issues ready before the case conference.
- **Requests for further information:** Where the NDIA is requesting further evidence if you think that evidence has already been provided point to it in the T Documents and ask why further documentation is required.
- **Evidence gathering:** We generally now take the approach that after an internal review decision it is better to wait until the first case conference before gathering any further evidence. This is because the Statement of Issues will be more specific about the questions that need to be addressed and it is costly to obtain a report from a specialist before the first case conference and avoids needing to obtain another one to address the questions.
- **Supports disputes:** If the supports being requested were not clearly articulated in the internal review decision or the supports required have changed since the internal review we do recommend that at least 2 or 3 weeks before the first case conference the applicant emails the Tribunal and NDIA lawyer to clarify the supports being sought.

Supporting documents

Key documents in any matter:

- **Statement of lived experience:** We find that a detailed statement setting out the applicant's:
 - Impairments and how they impact on daily life – no detail is too small, paint a picture
 - Home
 - Informal and formal supports
 - Need for support (in a supports dispute detail each support you are seeking)
 - Risks of not getting the support.
- **Reports from medical experts / allied health professionals:** These reports need to address the criteria that needs to be satisfied. They should be given a copy of the
 - [Persons Giving Expert and Opinion Evidence Guideline](#) published by the Tribunal.

Common issues

- Support coordinator attending cases conferences with Participants: Issues:
 - There is a conflict of interest where support coordination or other supports which may financially benefit the support coordinator are in dispute
 - Funds in a plan cannot be used to fund a support coordinator to attend a case conference
- Changing a plan, renewing a plan or adding a support to a plan while a participant is at the Tribunal. This must be done via a remittal to the CEO of the NDIA under **section 42D** of the AAT Act
- Ending a Tribunal proceeding is done via a 'S42C Agreement' made under **section 42C** of the AAT Act
- Independent medical examinations. The Tribunal cannot compel a person to undergo an independent medical examination. See [LPSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs \[2021\] FCA 1563 \(15 December 2021\)](#)

Common issues cont

- Section 48 v s100
- Section 48 v s42D remittal
- Rule 5.1(b) of the Support Rules “not related to your disability” – see [McLaughlin and National Disability Insurance Agency \[2021\] AATA 496 \(12 March 2021\)](#)
- [Model litigant rules not being observed by the NDIA](#)

Our NDIS Appeals Service

- Weekly advice appointments with follow up written advice and templates
- Limited number of ongoing clients where full representation at the Tribunal is provided



Queensland Advocacy Incorporated



PEOPLE WITH DISABILITY
AUSTRALIA



rights in action

Speaking Up For You



Ia^{NQ} | Independent
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 Legal Aid
QUEENSLAND

Contact us

QAI provides advocacy for people with disability.

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